Order

Michigan Supreme Court
Lansing, Michigan

Entered: March 28, 2002

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

1999-10

Proposed Amendments of
Rules 703 and 1101 of the
Michigan Rules of Evidence

_____

On order of the Court, this is to advise that the Court is considering amendments of Rules 703 and 1101 of the Michigan Rules of Evidence. Before determining whether the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment. The Court welcomes the views of all who wish to address the form or the merits of the proposals or to suggest alternatives. Before adoption or rejection, the proposals will be considered by the Court at a public hearing. Notice of future public hearings will be provided by the Court and posted on the Court's website, www.courts.michigan.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposals in their present form.

[The present language of Rules 703 and 1101 would be amended as indicated below.]

Rule 703 Bases of Opinion Testimony by Experts

[Alternative A]

The facts or data in the particular case upon which an expert bases an opinion or inference ~~may be those perceived by or made known to the expert at or before the hearing~~ shall be in evidence. ~~The court may require that underlying facts or data essential to an opinion or inference be in evidence.~~ This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

[Alternative B]

~~The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.~~

(a) Except as otherwise provided in subrule (b), the facts or data in the particular case upon which an expert bases an opinion or inference must be admissible and admitted in evidence.

(b) If the court finds that the proponent of an expert opinion or inference has shown that there is no good-faith basis for contesting the truth or accuracy of specified inadmissible or unadmitted facts or data in the particular case, the court may admit an expert opinion or inference that is based on those facts or data. The proponent may not disclose the inadmissible or unadmitted facts or data to a jury. If the court is the finder of fact, the court may consider those facts or data only for the purpose of determining whether the required threshold is established.

Staff Comment: Alternative A was published for comment previously on October 10, 2000. It was recommended by the Advisory Committee on the Rules of Evidence, which envisioned it as a stand-alone rule. Alternative B and the proposed amendment of MRE 1101 that follows this comment were drafted in response to comments that the Court received following that first publication. The proposed amendment of MRE 1101 is designed to complement either proposal for MRE 703.

Both alternatives for MRE 703 would correct a common misreading of the current rule. As adopted in 1978, MRE 703 said, “The court may require that the underlying facts or data essential to an opinion or inference be in evidence.” That language was designed to give courts the discretion to exclude opinions that are not based on admissible evidence. However, the rule came to be understood as allowing an expert to testify about inadmissible hearsay that was part of the basis for the expert's opinion.

Alternative A would allow the introduction of an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony. That was the pre-MRE common-law rule. Much of the inconvenience that accompanied the common-law rule has been ameliorated by newer hearsay exceptions, including MRE 803(6) and (24), MRE 804(b)(6), and MRE 902(11).

Alternatives A and B retain the current rule's reference to the facts or data "in the particular case," i.e., neither the current rule nor these proposed amendments require independent proof of the sources of knowledge that qualify the witness as an expert.

Alternative B's first paragraph states the general principle that the expert's opinion may not be admitted unless it is based on facts or data that have been properly introduced into evidence. The second paragraph creates a limited exception that allows admitting an opinion that is based on hearsay, provided there is no good-faith basis for contesting the truth or accuracy of the hearsay. However, even when the exception allows the opinion to be introduced, the proponent of the opinion may not disclose the unadmitted supporting facts or data to a jury. In a case tried without a jury, the court may consider the facts or data only to determine whether the proponent has made the required threshold showing.

Whenever possible, decisions about whether an opinion will be admitted pursuant to subrule (b) of Alternative B should be made in pretrial rulings. The court may require the parties to file motions, responses, and supporting affidavits in which the proponent discloses the factual basis for an opinion and the opponent states any challenges to the truth of that factual basis. MCR 2.114 applies to the documents that are filed to disclose or challenge an opinion's factual basis.

Rule 1101 Applicability

(a) [Unchanged.]

(b) *Rules inapplicable.* The rules other than those with respect to privileges do not apply in the following situations and proceedings:

(1)-(8) [Unchanged.]

(9) *Domestic Relations Matters.* The court's consideration of a report or recommendation submitted by the friend of the court pursuant to MCL 552.505(d) or (e).

(10) *Mental Health Hearings.* In preliminary hearings under Chapters 4, 4A, 5 and 6 of the Mental Health Code, MCL 330.1400 *et seq.*, the court may consider hearsay data that are part of the basis for the diagnosis presented by a testifying mental health expert.

Staff Comment: The proposed new subrules (b)(9) and (10) would complement either of the MRE 703 proposals published in this order. When the MRE 703 (Alternative A) proposal was published previously, family law practitioners commented that mental health experts who perform custody evaluations must base their opinions, to some extent, on hearsay information. Several probate judges commented that statutory deadlines for conducting preliminary mental health commitment proceedings require judges to rely on expert opinions that are based on some hearsay. This proposal addresses those concerns. Proposed Subrule (b)(9) would allow a trial judge to

consider the Friend of the Court report prepared pursuant to MCL 552.505(d) or (e). Those reports "may include reports and evaluations by outside persons or agencies if requested by the parties or the court . . . ." Proposed subrule (b)(10) allows probate judges who are conducting preliminary mental health hearings to consider expert opinions that otherwise would be excluded by Rule 703 because the opinions are based on hearsay information.

Although these proposals may be modified before adoption, it is anticipated that MRE 1101(b) will be amended if the Court adopts either proposed alternative amendment of Rule 703.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court clerk in writing or electronically by *July 1, 2002*. P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@jud.state.mi.us. When filing a comment, please refer to file **1999-10**.